Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: November 30, 2016

CASE NO(S).: LC050010
LC060055
LC070009
LC080005

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Paciorka Leaseholds Limited
Respondent:	City of Windsor
Subject:	Land compensation; Injurious Affection
Property Address/ Description:	Parts 5, 6, 7, 8, 12, 13, 15, 20, 22, 23, 34, 35, 36, 37, 42, 43 and 44 on Plan of Expropriation No. RE1541750, deposited in the Land Registry Office for the Registry Division Land Titles Division of Essex; Remaining lands within the Malden Planning Area shown on Registered Plan 911
Municipality:	City of Windsor
OMB Case No.:	LC050010
OMB File No.:	L050012
OMB Case Name:	Paciorka Leaseholds Limited v. Windsor (City)

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Bruce Paciorka
Respondent:	City of Windsor
Subject:	Land Compensation
Property Address/ Description:	Part 60 on Plan of Expropriation No. RE1541750
Municipality:	City of Windsor
OMB Case No.:	LC050010
OMB File No.:	L050013

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka
Respondent:	City of Windsor
Subject:	Land compensation; Injurious Affection
Property Address/ Description:	Parts 2, 3, 4, 8, 10, 13, 18, 24, 26, 40 and 42 on Plan of Expropriation No. R154470 (CE 191183); Remaining lands within the Malden Planning Area shown on Registered Plan 911
Municipality:	City of Windsor
OMB Case No.:	LC060055
OMB File No.:	L060057

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Elizabeth Frey
Respondent:	City of Windsor
Subject:	Land compensation; Injurious Affection
Property Address/ Description:	Parts 46, 49 and 50 on Plan of Expropriation No. R1541750 and CE68952; Remaining lands within the Malden Planning Area and more particularly shown as Lots 242-244, Plan 875, and Lots 37-40 on the same Plan
Municipality:	City of Windsor
OMB Case No.:	LC070009
OMB File No.:	L070009

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka
Respondent:	City of Windsor
Subject:	Land compensation; Injurious Affection
Property Address/ Description:	Parts 55, 57, 60, 64, 69, 70 and 115 on Plan of Expropriation No. RE1547685 (CE 312765), deposited in the Land Registry Office for the Registry Division and Land Titles Division of Essex (12); Remaining lands within the Malden Planning Area shown on Registered Plan 911

Municipality:	City of Windsor
OMB Case No.:	LC080005
OMB File No.:	LC080005

PROCEEDING COMMENCED UNDER subsection 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, as amended, and Rule 34 of the Board's Rules of Practice and Procedure

Request by:	City of Windsor
Request for:	Request for Directions

This decision takes effect on the issue date, which is the date that it is e-mailed by Board administrative staff to the parties.

Heard: July 27, 2016 in Toronto, Ontario

APPEARANCES:

Parties	**Counsel**
Paciorka Leaseholds Limited, Gordon Paciorka, Bruce Paciorka and Elizabeth Frey	J. Beitchman and C. Harris
The Corporation of the City of Windsor	S. Waqué

DECISION DELIVERED BY R. G. M. MAKUCH AND ORDER OF THE BOARD

[1] There are three matters before the Board:

1. Motion by Elizabeth Frey for an Order of the Board granting her leave to amend the Notice of Arbitration and Statement of Claim (File No. L070009);
2. Motion by the City of Windsor ("City") for an Order of the Board compelling the Claimants to answer their undertakings, under advisements and refusals

arising from the examination for discovery of Bruce Paciorka, held May 11, 2016; and

3. Motion by the Claimants for an Order of the Board compelling the City to answer all of its outstanding undertakings, questions taken under advisement and improper refusals arising from the examination for discovery of Thom Hunt, held on May 18, 2016.

ELIZABETH FREY MOTION

[2] The Motion by Elizabeth Frey was on consent of the City. The Board will accordingly grant leave to Elizabeth Frey to amend her Notice of Arbitration and Statement of Claim in File No. L070009 and issue the Order set out as Attachment 1 hereto.

MATERIALS RELIED ON BY THE PARTIES

[3] The materials before the Board on the Motions by the Claimants and the City to compel answers given during the Examinations for Discovery consist of the following:

1) Motion Record of the Claimants Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka dated July 15, 2016, including the affidavit of Elana Goldfried, sworn July 15, 2016;

2) Factum of the Claimants Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka dated July 15, 2016;

3) Book of Authorities of the Claimants Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka dated July 15, 2016;

4) Responding Motion Record of the Respondent Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka dated July 25, 2016, including the affidavit of Elana Goldfried, sworn July 25, 2016;

5) Factum of the Respondent Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka dated July 25, 2016;

6) Book of Authorities of the Respondent Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka dated July 25, 2016;

7) Motion Record of the City dated July 15, 2016, including the affidavit of Meagan Patry, sworn July 15, 2016;

8) Responding Motion Record of the Respondent City dated July 25, 2016, including:

   a) the affidavit of Thom Hunt, sworn July 25, 2016;

   b) the affidavit of Jonahbelle Cox Mondello, sworn July 25, 2016; and

   c) the transcript of the examination of Thom Hunt on May 18, 2016.

9) Factum of the Respondent Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka dated July 25, 2016;

10) Book of Authorities of the City dated July 25, 2016;

11) Compendium of Under Advisements and Refusals given during the Examination of Thomas Hunt on May 18, 2016;

13) Affidavit of Elana Goldfried, sworn July 27, 2016;

14) Factum of the Respondent City dated July 25, 2016; and

15) The City's Book of Authorities.

CITY MOTION

[4] The City brings this Motion on the grounds that the Claimants did not provide answers to their undertakings, under advisements and refusals arising from the examination for discovery of Bruce Paciorka, held May 11, 2016. The City maintains that this information is necessary and relevant to the issues to be determined by the Board and is within the knowledge, power and control of the Claimants.

[5] The Claimants maintain that they have provided answers to all outstanding undertakings and a significant number of questions taken under advisement prior to the service of the City's Motion Record and that the motion is now moot.

[6] They maintain that they are not obligated to answer the remaining questions which were refused on the grounds of privilege and relevance. They argue that certain questions seek opinion or analysis and not fact and as such constitute impermissible cross-examination. Such questions relate to the request for production of factual information underlying an expert's report prepared in contemplation of litigation. Counsel for the Claimants argues that such information remains privileged unless the Claimants intend to call the authors of such expert reports at trial since an expert report that is not relied upon at trial has no evidentiary value in the proceedings and that disclosure of factual information underlying it remains exempt from production. The date by which counsel must decide which experts they intend to rely upon at trial has not passed and counsel have not yet decided whether they will be calling the author of the report in question and that therefore the request for underlying information is premature. The Board agrees with counsel for the Claimants. This request is premature until such time as the Claimants advise that the subject report will be relied on at the hearing. This aspect of the motion is adjourned until the deadline passes for the delivery of reports to be relied on at the hearing.

[7] With respect to information sought by the City that is alleged to be irrelevant by the Claimants, these concern the state of natural features on the property at the time the experts who prepared the July 2015 report were making observations for these reports in 2013 and 2015. The expropriations took place in 2004, 2005 and 2008 and the experts' observations were of the natural state of the property long after the expropriations at issue were undertaken.

[8] The Claimants maintain that the state of any natural features on the property in dispute after the expropriations is irrelevant to these proceedings.

[9] As the Claimants have specifically pled that and admitted that the physical features of the property after the expropriations are not relevant, the City has not disputed this point or pled that such features are relevant. An admission made in a pleading is binding unless withdrawn with leave of the Board.

[10] The natural features on the property, and their development or alteration prior to the expropriations are relevant and will be a significant issue at the hearing. Observations of the current state of the property are not relevant for determining compensation and the requested information is not producible on that basis. The Board agrees. This aspect of the City's motion is also dismissed.

[11] The Claimants also maintain that questions relating to a stop work order issued by the Ministry of Natural Resources and Forestry that is not mentioned in the pleadings and has no bearing on the expropriations are therefore irrelevant to the determination of compensation. It occurred long after the expropriations.

[12] Questions relating to the acquisition of a tractor by the Claimants as well as respecting lawn cutting activities by the Claimants after the date of the expropriations are also argued to be irrelevant by the Claimants. The Board is not in a position to determine whether this information is relevant or not and will therefore order the claimants to produce this information.

CLAIMANTS' MOTION

[13] The Claimants bring this Motion on the grounds that the City did not provide responses to all undertakings, nor to questions taken under advisement or improperly refused and the City is obliged to provide answers to its outstanding undertakings arising from the examination for discovery of Thom Hunt on May 18, 2016. Furthermore, the responses to the unanswered questions taken under advisement and questions improperly refused are relevant to the matters at issue in these proceedings and to obtain full disclosure in order to complete the preparation of experts' reports on their behalf and to assist the Board with the determination of compensation.

[14] Counsel for the Claimants argues that the answers to all of these questions are relevant in relation to the pleadings as amended in these proceedings and maintains that the Claimants are entitled to full and frank answers and will be unfairly prejudiced if answers to the outstanding questions are not provided.

[15] Mr. Waqué on behalf of the City argues that the questions were properly refused on the grounds of relevancy and proportionality taking into account the number, scope, and nature of the Claimants' requests. He argues that the Claimants cite dated authorities in support of their position that they are entitled to broad discovery rights - a position that harkens back to a time when a mere "semblance of relevance" was sufficient to render a question proper. Civil litigation in Ontario has flatly rejected this approach according to Mr. Waqué and the Claimants are mistaken on the standard of relevancy that should be applied to refusals. In 2016, questions posed on examination for discovery must be relevant to the issues in dispute and relevance is assessed in a contextual manner respecting the quality of the evidence in the record and the factors listed in Rule 29.2 according to Mr. Waqué. Parties should strive to seek the best evidence available—not any and all evidence that merely pertains to subjects related to the issues in dispute. This is especially the case before a specialized tribunal where the issues relate to complex land use planning concepts that are properly the subject matter of expert evidence. Without proportionality, all information and records of the City's planning department going back decades are theoretically related to the Claimants claims.

[16] It is acknowledged by the City that the Claimants have raised new issues in their amended pleadings and that they are entitled to examine Mr. Hunt on those new issues. Counsel argues however, that the Claimants' questions must be sufficiently tailored to produce evidence that is truly probative of the new issues raised. The City claims that the Claimants are asking the City to scour decades-old records for ancillary documents such as meeting agendas, working notes, and the contact information for unspecified persons who may have had a hand in the planning process. The Claimants have also asked the City to identify other properties across the City that have some related

characteristics to the Subject Property and provide a wide variety of information respecting the development and natural heritage processes that have been applied to those lands and that such requests are not proportional within the meaning of the Rules.

[17] Furthermore, the new issues raised in the pleadings amendments do not constitute a discrete or unique cause of action from the claim as originally pleaded. Rather, the amendments respond to the Court of Appeal's direction respecting the characterization of the expropriation scheme—a matter that the Claimants have had ample opportunity to examine. As such, the existing evidence compiled to date, supplemented by the evidence of Mr. Hunt, provides a robust record that is sufficiently responsive to the Claimants' case as pleaded.

[18] The imprecise and open-ended nature of the Claimants' questions would require extensive efforts on behalf of City staff, experts, and counsel to legitimately fulfill. Mr. Hunt's evidence was robust and the number of refusals is reflective of the fact that the Claimants sought three times as many undertakings as the City did during its examination of Mr. Paciorka. To welcome this Motion would send the City on dozens of fact-finding missions wholly disproportionate to any reasonable estimation of the evidentiary fruit borne out of such efforts.

[19] Counsel for the City argues that the City does not have the resources to compile, review and curate the information requested by the Claimants and that it would not be possible to comment on the workload required for each refusal such as requiring the City to review all files across the City departments from the material time of the implementation of OPA No. 5. Mr. Waqué argues that some of the questions were so broad and open-ended that these would require a workload equivalent to that of the preparation of a separate study in order to provide legitimate responses.

[20] Counsel for the City argues that requiring the City to respond to the refusals would require an unreasonable amount of time and expense, would potentially interfere with the orderly progress of the proceedings and would place a disproportionate burden

on the City in the circumstances. Accordingly, the City's refusals were proper given the extensive probative evidence in the record and the number and nature of the refused questions. Furthermore, the Claimants will be able to fully make their case at the hearing of this matter taking into account the long history of these proceedings, the evidence in the record and the expertise of the Claimants' retained team of experts.

[21] The refusals at issue in this Motion were broadly categorized by the Claimants as follows:

a) Questions relating to Official Plan Amendment 33 ("OPA 33"), Official Plan Amendment 5 ("OPA 5") and other Official Plan Amendments ("OPAs") implemented by the Respondent, including environmental studies and reports relating to these OPAs;

b) Questions relating to work done with or by the Essex Region Conservation Authority ("ERCA") or the Ontario Ministry of Natural Resources and Forestry ("MNRF") and for documents relating to that work;

c) Questions relating to the market value and development of other lands in the Greater Windsor area and the vicinity of the Claimants' properties, including lands that had environmental designations similar to the Claimants' lands;

d) Questions relating to in camera meetings of the Respondent's City Council or Committees thereof, at which the Spring Garden Complex was discussed;

e) Other miscellaneous questions.

a) The Claimants are entitled to full discovery to determine Questions Related to OPAs Implemented and Environmental Studies Done by the Respondent.

[22] The Notices of Arbitration and Statement of Claim make extensive reference to OPA 33 and OPA 5, which govern the Malden Planning Area and the Claimants' lands prior to expropriation. The Claimants outline in their claim that these policies and OPAs

by the Respondent impacted the market value of their land, formed part of the scheme for which their property was expropriated, and have contributed to the injurious affection which they have suffered.

[23] OPA 33 was adopted by City Council in 1977 and provides guidelines for the servicing and development of the Malden Planning Area, in which the Claimants' lands are located.

[24] The Claimants argue that OPA 5, which was adopted by Council on December 17, 2001 and approved by the Ontario Municipal Board ("OMB") on November 29, 2002 are relevant to their claim since they allege that prior to OPA 5 there was no Spring Garden Natural Area Complex or other environmental designation that would prevent urban development in accordance with OPA 33. But for the restrictions imposed by the scheme in the planning process for OPA 5, significant portions of the Claimants' properties would have been developable.

[25] The Claimants maintain that these OPAs are a central issue in dispute in these proceedings and they are entitled to have discovery on these including discovery related to the City's implementation of both OPA 33 and OPA 5, and the supporting documentation underlying their implementation. Such questions are entirely proper and relate to subject matter relevant to the issues raised in this proceeding as these simply seek foundational information underlying the City's implementation of these OPAs.

[26] The Claimants argue that they are entitled to have the questions in this category answered and to review the information related to these in order to thoroughly canvass the issues arising from OPA 33 and OPA 5 in these proceedings. This will allow them to understand the defence they have to meet from the City and may assist to narrow the issues in this proceeding and find hearing efficiencies.

[27] Discovery is by its nature intended to be broad and wide-ranging in order to narrow the issues in dispute and avoid surprise. The only constraints on the breadth of

discovery are relevance and privilege. All questions in this category are relevant to the matters in dispute in this proceeding and the City should be compelled to answer these.

b) Questions Related to Work Done with or by ERCA or MNRF and Documents Relating to that Work

[28] These are relevant to these proceedings and should be produced by the City. The ERCA is a governmental body that includes representatives from the area municipalities; four of its Board seats are reserved for representatives from the Respondent. The ERCA was involved in environmental regulation and policy decisions of the Respondent and played a central role in the identification and designation of the Spring Garden Complex. The environmental regulation of the Claimants' lands, and the impact of those regulations, is a central issue in these proceedings. Documents from the ERCA in relation to those issues are relevant to these proceedings and the Claimants are entitled to review and obtain discovery of these as part of their case.

[29] Likewise the MNRF has had significant involvement with the City's environmental regulatory policies and have been directly involved in a number of environmental studies and reviews of the Claimants' lands and surrounding area. Furthermore the City has pled in its Reply that it is provincial environmental policy, and not the City's scheme for which the Claimants' lands were expropriated, that have caused them harm. The City affirmed that its position is that it was the MNRF that determined the use of the lands within the Spring Garden Complex, and not the City. The questions and information requested is directly relevant to these issues and should be produced.

[30] It is also important to note that the vast majority of these questions arise from documents already contained within the City's productions. The issues to which they pertain are relevant to these proceedings and answering these questions will allow the Claimants to fully understand the defence pled by the City and possibly narrow issues for hearing. The Respondent should be compelled to answer these.

c) The City should answer questions related to the market value, environmental designation and development of other lands in the Greater Windsor Area and the vicinity of the Claimants' lands

[31] These relate to the development, or application for development, of other lands subject to environmental regulation analogous to the Claimants' lands for residential purposes, and to valuation data in the Respondent's possession for lands analogous, or in close proximity, to the Claimants' lands.

[32] The Claimants have pled that other lands subject to environmental regulation or designation by the City have been treated differently in terms of its developability and valuation. The City has denied these claims and has put the Claimants to the strict proof thereof.

[33] Questions related to these issues as pled by the parties are relevant to the matters at issue in this proceeding and should be answered. The Board has compelled production of information relating to the treatment of other lands in the vicinity of those expropriated as part of proceedings to determine compensation. The Board should apply that principle in this case with respect to the questions in this category. The questions relate to lands similar to those at issue in these compensation proceedings which are in the same vicinity.

[34] The information requested would allow the Claimants to fully understand the City's defence and avoid surprise at the hearing. The requested information could help determine whether the differential treatment pled by the Claimants did in fact occur, which could narrow issues in the proceeding and increase the efficiency of the hearing process.

[35] The questions posed by the Claimants in this category include two specific examples regarding the treatment of analogous lands; lands at issue with respect to the Detroit River International Crossing ("DRIC") project, and the Oakwood Woodlot.

[36] The DRIC project is a parkway project intended to provide an alternative vehicle border crossing between Canada and the United States in the Windsor area. In order to facilitate the DRIC project a significant amount of land had to be acquired, some of which was in the immediate vicinity of the Claimants lands.

[37] The questions and information related to the DRIC project refused by the Respondent largely relate to the valuation of lands acquired from the City. This information is directly relevant to the claim and should be produced. The City has acknowledged that information relating to the DRIC project is relevant to the regulation of environmental designations in and around the Spring Garden Complex. It has provided an undertaking to produce this information while at the same time refusing to provide information about lands acquired from the City for the DRIC project.

[38] Given the vicinity of these lands to those at issue in this proceeding and their similar nature, the valuation of those lands is relevant to these proceedings. The Claimants are entitled to information about these lands and their treatment, and to have their questions answered as to whether there are other lands treated similarly by the City. The City should be compelled to answer questions on this subject and regarding this category as a whole.

[39] Also included in this category are a series of questions related to lands known as the Oakwood Woodlot. These lands are in close proximity to the expropriated lands and evidence as to their valuation is relevant. The environmental designation on these lands appears to be similar to the expropriated lands and those within the Malden Planning Area/Spring Garden Complex.

[40] The Claimants are bound by the deemed undertaking set out in the *Rules of Civil Procedure*, which provide that information disclosed during discovery will only be used in the subject proceedings. This negates any concerns about privacy of third party information.

d) Questions relating to in camera meetings of City Council or its committees, should be answered

[41] These relate to information arising from in camera meetings of City Council or committees thereof. These questions arise from documents already produced by the City as part of these proceedings.

[42] The City has claimed that privilege or confidentiality bars production of the information requested in these questions. Question 512 concerns a meeting that occurred on August 31, 1998 and was refused on the basis of litigation privilege in relation to these proceedings. This meeting occurred six years prior to any of the expropriations giving rise to this litigation. It is inconceivable that litigation was contemplated this long before any actual proceedings were commenced by the Claimants.

[43] The City has also claimed that because the meetings at issue were held “in camera” as set out in the *Municipal Act*, they are confidential and cannot be the subject of discovery. Such in camera meetings are not presumptively privileged and the Courts have ordered the disclosure of information arising from such meetings in discovery. Confidential information is not the same as privileged information and may be disclosed during the discovery process.

[44] The City has not established that any class of privilege applies to the requested information. They have, in their productions, disclosed other information arising from in camera meetings of the City Council or Committees. The information requested by the Claimants in these questions relates to discussions of their land, and the treatment of the expropriated land by the City. It is relevant to the matters at issue in this proceeding and the City should be compelled to answer these questions.

e) The City should be compelled to answer its remaining refused questions.

[45] Some questions under this heading relate to the City’s document management and destruction policies. Several were refused on the basis that the City no longer has

the documents or information requested by the Claimants as it was destroyed in accordance with document management policies. The information about which questions and whether they exist. The City should be compelled to answer the questions to ensure such policies are in place and to what extent they have been followed.

[46] Question related to a request by the Claimants to have the transcripts and exhibits of the first Board hearing in this matter made exhibits to Mr. Hunt's examination for discovery, as well as to adopt the evidence of the City's witnesses at the first hearing as discovery evidence in these proceedings. The City has refused to do so on the basis that the witnesses who gave that evidence are no longer employed by the City and will not be testifying at the re-hearing in this matter. The City had initially proposed a representative for the purposes of examination for discovery, who is no longer employed by it, but who gave evidence at the first hearing. The City maintained this refusal to produce a current employee until a Motion to compel Mr. Hunt's attendance was proposed by the Claimants.

[47] Evidence given by the City's representatives on prior examinations for discovery and at the first hearing was the evidence of the City, not the individual testifying. Their answers, which were provided under oath at discovery and at the hearing continue to bind the City, irrespective of their current employment status. The City has made the same request of Bruce Paciorka; that he adopts the questions asked and answers provided at the prior examination for discovery and at the first hearing as transcripts of examination for discovery for the purposes of this proceeding. The Board finds that it is in the parties' interests to narrowing the issues and conduct an efficient hearing of this matter to make effective use of its time and resources. The City should be compelled to adopt its previous evidence as sought by the Claimants as should the Claimants.

[48] The City has pled that the eastern chipmunk is rare and occupies the Claimants' lands and has refused to answer questions on this topic. This question is clearly relevant as it arises directly from the City's pleadings and the Claimants are entitled to

know the case they have to meet and the City should be compelled to answer this question.

[49] The Respondent should be compelled to adopt its previous evidence in the manner sought by the Claimants.

[50] The only issue on this Motion is whether the City should be compelled to answer its outstanding refusals on the basis that these were improperly refused.

[51] The Board has carefully considered the evidence before it as well as the submissions of counsel and finds that the City improperly refused to answer its outstanding refusals and should be compelled to answer these for the reasons that follow.

[52] Rule 4 of the OMB *Rules of Practice and Procedure* ("OMB Rules") permits the Board to "do whatever is necessary and permitted by law to enable it to adjudicate effectively and completely on any matter before it". It also incorporates by reference the *Ontario Rules of Civil Procedure* ("Rules").

[53] The Rules require that a person examined for discovery must answer "any proper question that is relevant to any matter in issue in the action". The scope of relevance is broad in the discovery process, and includes both matters of fact and matters related to a party's position on legal issues.

[54] Rule 31.06(1) obliges a witness on an examination for discovery to answer "any proper question relevant to any matter in issue in the action".

[55] Rule 1.04(1.1) relied on by Mr. Waqué, appears to impose what has been referred to as the "proportionality principle" to the rule on relevance set out above. It reads as follows:

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved in the proceeding.

[56] The matters before the Board consist of the adjudication of the amount of compensation to be paid to the Claimants by the City for the taking of their lands without their consent under statute. The Board considers these matters to be quite important and no doubt, the Claimants also consider these matters to be quite important to them. It is also trite to suggest that such matters involve a level of complexity well beyond what one would ordinarily expect in ordinary litigation. The parties and the Board rely on reports filed by experts to assist in the complex exercise of arriving at the appropriate compensation for the taking of lands without the owners' consent. The amount claimed is also quite substantial and requires the parties to incur considerable expenditures in advancing and defending the claims.

[57] The broad scope of relevance for the purposes of discovery is meant to facilitate fairness to the party that does not have the requested information so that they are not disadvantaged in making meaningful submissions concerning its relevance. The Board will compel the disclosure of requested information in order to allow a party to know the case it has to meet and to narrow the issues and create efficiencies in the hearing process.

[58] Even allegations of potential privilege do not necessarily preclude disclosure. It has been characterized as a matter of the weight to be afforded that material by the Board hearing the claim on the merits, not its admissibility or producibility.

[59] The Board does not agree with Mr. Waqué's submission that the principle of proportionality should "trump" relevance in this case. All of the matters raised during the discovery process are relevant to the Claimants in advancing their claim and should have answers to the questions asked and information sought.

[60] The Board does not accept Mr. Waqué's assertion that requiring the City to provide the information requested would be financially too onerous and would require an inordinate amount of time to be devoted by City staff.

[61] It is in the best interests of the parties in this case to narrow the issues and promote an efficient hearing of this matter. It is the Board's responsibility to make efficient use of the time and resources of the Board and the respective parties.

[62] The Board is satisfied on the balance of probabilities that the information sought, if provided in advance of the hearing, may assist the Board in narrowing the issues and result in a more efficient hearing currently expected to take up to eight weeks.

[63] Accordingly, the Motion by the Claimants is allowed and the City is hereby ordered to answer all of its outstanding undertakings, questions taken under advisement and improper refusals arising from the examination for discovery of Thom Hunt, held on May 18, 2016.

"R. G. M. Makuch"

R. G. M. MAKUCH
MEMBER

OMB File No. L070009

ONTARIO MUNICIPAL BOARD

IN THE MATTER OF THE *EXPROPRIATIONS ACT*, RSO 1990, c E-26

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ELIZABETH FREY

Claimant

- and -

THE CORPORATION OF THE CITY OF WINDSOR

Respondent

ORDER

THIS MOTION made by the Claimant, Elizabeth Frey, for an Order for leave to amend the Notice of Arbitration and Statement of Claim was heard this day at the City of Toronto, Ontario.

UPON READING the Claimant's Motion Record, including the draft Fresh as Amended Notice of Arbitration and Statement of Claim, and the consent of the parties, filed with the Board,

THIS BOARD ORDERS that:

1. Leave is granted for the Claimant to amend the Notice of Arbitration and Statement of Claim in OMB File No. L07009;

2. The Fresh as Amended Notice of Arbitration and Statement of Claim shall be issued in the form attached hereto as Schedule "A";

3. The Procedural Order issued by the Board on March 7, 2016 in OMB File Nos. LC050010, LC060055 and LC080005 (the "Paciorka Claims"), shall apply to the within proceeding;

4. This proceeding shall proceed together with and be heard at the same time as the Paciorka Claims;

5. The Examinations for Discovery conducted by the parties in the Paciorka Claims shall be adopted as the Examinations for Discovery in respect of this Claim; and

6. The time for service and filing of the Respondent's Reply shall be 20 days from the date the Consent was executed by the Respondent.

"R.G.M. Makuch"

R. G. M. MAKUCH
MEMBER

SCHEDULE A

OMB File No. **L070009**

ONTARIO MUNICIPAL BOARD

IN THE MATTER OF THE *EXPROPRIATIONS ACT*, RSO 1990, c E-26

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ELIZABETH FREY

Claimant

-and-

THE CORPORATION OF THE CITY OF WINDSOR

Respondent

FRESH AS AMENDED NOTICE OF ARBITRATION

1. Take Notice that the Claimant, Elizabeth Frey ("Elizabeth"), requires that compensation claimed by her from the Respondent, the Corporation of the City of Windsor (the "Respondent") with respect to the lands described below be determined by the Ontario Municipal Board (the "Board").

2. Elizabeth claims compensation arising from the expropriation, by the Respondent, of her lands legally registered as Parts 46, 49 and 50 on Plan of Expropriation No. R1541750 and CE68952, registered in the Registry Office for the Registry Division and Land Titles Division of Essex (No. 12) on April 7, 2004.

3. Elizabeth also claims compensation for injurious affection to her remaining lands within the Malden Planning Area, subsequently designated the Spring Garden Planning Area; more particularly those lands shown as Lots 37-40 and Lots 242-244, Plan 875.

FRESH AS AMENDED STATEMENT OF CLAIM

Background and Parties

4. Elizabeth is a widow who resides in the Town of Tecumseh, in the Region of Essex. She and her late husband, Philip Frey, owned 28 lots in the Malden Planning Area of southwest Windsor. After Philip Frey died on January 28, 1987, Elizabeth became the owner of those lots.

5. The Respondent is a municipal corporation which at all material times had planning and servicing jurisdiction over the lands owned by Elizabeth.

6. The scheme or development for which the Respondent expropriated the lands described in paragraph 2 (and including other lands expropriated from members of Elizabeth's family and neighbouring owners) is the lengthy planning process that resulted in the acquisition of Elizabeth's property for a park called the Spring Garden Area of Natural and Scientific Interest (the "Spring Garden Complex"). The scheme and its impact on Elizabeth and her lands is discussed in further detail below.

The Expropriated Lands

7. The expropriated lands are located in the Malden Planning Area in southwest Windsor. The Malden Planning Area is bounded by the E.C. Row Expressway to the north, Huron Church Road to the east, the municipal boundary with the Town of LaSalle to the south, and Malden Road to the west.

8. The Malden Planning Area contained approximately 283 hectares (700 acres) and was originally subdivided into approximately 6,500 residential lots on 14 registered plans.

9. As of the date of value there were approximately 305 fully municipally serviced residential dwelling units within the Malden Planning Area. Many of these homes were located in the Huron Estates Subdivisions and were constructed from the late 1970s to the early 1990s, in two phases. A third phase did not receive planning approval because of the impact the planning process for the Spring Garden Complex had on the Malden Planning Area.

10. In 1977 the Respondent's City Council adopted Official Plan Amendment 33 ("OPA 33"), which was intended to provide guidelines for the servicing and development of the Malden Planning Area. OPA 33 provided for single family, medium density and high density residential uses, with limited institutional and commercial uses. Phases 1 and 2 of the Huron Estates Subdivision were approved in accordance with the policies contained in OPA 33.

History of the Frey Assemblies

11. Philip Frey's parents acquired land on Lansing Avenue and constructed the family home there in 1942. In 1953, Elizabeth and Philip Frey constructed their home on Lansing Avenue.

12. Elizabeth and Philip Frey were the owners of 28 other lots with frontage on Beacon Avenue, Reddock Avenue and Lansing Avenue, in what would become the Malden Planning Area. These lots were assembled in conjunction with other members of the Claimant's family who owned a substantial number of residential lots in the area. The Claimant's total holdings had frontage of 1,033 feet and an area of 125,646 square feet.

Servicing of the Expropriated Lands

13. The servicing policies of the Respondent and the extension of municipal services to the lands expropriated from Elizabeth were directly impacted by the Respondent's intention, and its associated planning process, to acquire most of the lands within the Malden Planning Area for the Spring Garden Complex.

14. The Malden Planning Area was well served by a highway, arterial road and secondary road system which would have readily supported the proposed increase in local population through the development of Elizabeth's lands and those of her neighbours. The road included the E.C. Row Expressway, Huron Church Road, Malden Road and numerous secondary roads, some of which were not extended in the anticipated grid pattern because of the City's intention to acquire the Spring Garden Complex.

15. By 1997, the Malden Planning Area had adequate municipal infrastructure to support the development of Elizabeth's lands and those of her neighbours. This infrastructure included:

(a) A system of stormwater management drains;

(b) The western Main Trunk Sanitary Sewer and the subtrunk sanitary sewer from Second Street to Ensign Street;

(c) Municipal water through a system of 6 inch, 8 inch and 10 inch water mains;

(d) Natural gas mains, hydro-electric and telephone systems.

16. The Respondent was the largest land owner in the Malden Planning Area and its ownership was concentrated within the Spring Garden Complex. Several other developers owned substantial blocks of land within the Malden Planning Area and would have participated in the extension of services in, and the development of, the Malden Planning Area.

17. But for the Respondent's planning process, including its intention to acquire the Spring Garden Complex, Elizabeth's lands would have been serviced by extension of the above services. Prior to the date of value all of Elizabeth's lands would have been fully serviced and built, or sold.

Disregarding the Scheme

18. The development or scheme for which the expropriated lands were acquired is the lengthy planning process that culminated in the delineation of the Spring Garden Complex and the expropriation of Elizabeth's property.

19. In 1993 Dillon Consulting Limited prepared a Planning and Engineering Study for the Respondent which set out a range of options for providing servicing to the Malden Planning Area. On August 11, 1997 the Respondent, by way of Resolution 950/97, adopted the Malden Planning Area Development Plan submitted by Dillon Consulting, which delineated the Spring Garden Complex and recommended that there be no development within its boundaries. As Resolution 950/97 and the planning flowing from it was known and anticipated at the time, it resulted in delay or freezing of development of Elizabeth's lands in and around the Spring Garden Complex before 1997.

20. In 1999 the Respondent announced a five-year plan to acquire the lands required for the Spring Garden Complex. However the Respondent and the Province of Ontario had formed the intention to acquire these lands many years before. The intention to acquire the Spring Garden Complex had a profound effect on the services that the City made available within the Malden Planning Area, and the land use controls imposed by the City and the Province.

21. The market value of the lands expropriated from Elizabeth should be determined without regard to the planning process that included the intention to acquire the lands for the Spring Garden Complex, and as if this intention had not influenced the availability of municipal services and applicable land use controls. No account should be taken of the decrease in the value of

Elizabeth's lands resulting from the impact of the development or scheme, pursuant to paragraph 14(4)(b) of the *Expropriations Act*, RSO 1990, c E-26 (the "*Expropriations Act*").

22. In determining the highest and best use of the expropriated lands, the natural heritage features that existed on Elizabeth's property before the Respondent's planning altered it and its natural heritage features, must be taken into account. Natural heritage features that developed or that have been deliberately altered as a result of the Respondent's planning process must, on the other hand, be screened out.

23. While the applicable Provincial Policy Statement ought to be considered in determining the highest and best use of Elizabeth's property, the Respondent's Official Plan designations of "Natural Heritage" and "Greenway System" and implementing zoning by-laws, should be screened out and disregarded. Various other studies and designations with respect to the Spring Garden Complex that flowed from the Respondent's planning process should also be disregarded as part of the scheme for which land was acquired. These designations represent downzoning and are part of the Respondent's planning process for which the expropriated lands were acquired.

24. In anticipation of the expropriation the Respondent amended its Official Plan and undertook to acquire the lands for the Spring Garden Complex in three phases. This Official Plan Amendment was adopted by City Council on December 17, 2001 and approved by the Board on November 29, 2002 as Official Plan No. 5 ("OPA No. 5"). As part of the approval the Board set a timetable for the acquisition of lands required for the Spring Garden Complex. The Respondent proceeded to expropriate the first phase on April 7, 2004; the second phase on December 28, 2005; and the third phase on January 28, 2008.

25. Prior to OPA No. 5 and under OPA 33, there was no Spring Garden Complex or other environmental designation that would prevent urban development in OPA 33. Until the implementation of OPA No. 5 there was an expectation that the Malden Planning Area would have full urban development with the consideration, planning and accommodation for natural heritage features that were typical and standard for development lands at the relevant time, before the scheme froze development of the property.

26. Through the implementation of OPA No. 5 the Respondent designated approximately 420 acres in the centre of OPA 33 as Natural Heritage.

27. The planning and development process that culminated in OPA No. 5 favoured certain lands over those of the subject property for policy reasons separate and apart from natural heritage features. To Elizabeth's detriment, the Respondent and other planning authorities permitted similarly situated lands with natural heritage features to be developed during the relevant period. The planning authorities facilitated development in those areas by putting mitigation measures in place to deal with natural heritage features. That same planning process restricted the development of Elizabeth's property.

Natural Heritage Characteristics did not Prevent Development

28. The treatment of development lands with natural heritage features generally, and the Respondent's and other authorities' interpretation of the 1997 Provincial Policy Statement, demonstrates that while environmental and natural heritage features were a consideration they did not prohibit development. Through the use of appropriate mitigation measures lands with natural heritage features remained developable and were developed.

29. But for the restrictions imposed by the scheme and the planning process for OPA No. 5, significant portions of Elizabeth's property would have been developable and would have enjoyed market values similar to the residential lands in the Spring Garden Complex that were ultimately developed.

30. Environmental and planning data demonstrates that similar lands in the Windsor region and Southwest Ontario, and which also contained natural heritage features, were developed prior to and after implementation of the 2005 Provincial Policy Statement. This development occurred despite the natural heritage features.

31. The natural features and ecology of Elizabeth's property have been materially altered over time as a direct result of the expropriation and planning process that led to the expropriation. These alterations occurred through, among other things, the Respondent's imposition of restrictions on use and maintenance of the property and through transplantation and relocation of wildlife onto the property. This was done to intensify the natural heritage features and species located in the Spring Garden Complex.

32. The physical features of the property, as they currently stand, are irrelevant to a determination of highest and best use. An assessment of the suitability of Elizabeth's property for development must be done by assessing the property both before, and after, the scheme impeded its development. The assessment should not consider its present condition.

Market Value

33. Elizabeth claims compensation for the market value of the lands expropriated, based upon its highest and best use as set out above and without reference to the adverse impacts arising from the acquisition of the Spring Garden Complex and scheme. The highest and best use of the expropriated lands ought to assume that they were owned and controlled by reasonable and sophisticated owners with the ability to pursue development at the appropriate time, in the absence of the scheme.

Injurious Affection

34. The Respondent's expropriation of Elizabeth's lands has resulted in her remaining 7 lots on Lansing Avenue and Reddock Avenue in an area outside the Spring Garden Complex, which is now more difficult and expensive to service. Elizabeth's remaining lands are restricted to low density residential uses on wide lots because of their proximity to the Spring Garden Complex.

35. A wide buffer is now required between the Spring Garden Complex and any residential development. Noise and other attenuation measures are now required as a condition of development approval because of the existence and placement of the Spring Garden Complex. These factors, and delays to development arising from market uncertainty as a result of the acquisition process and the anticipation of acquisition of Elizabeth's lands, has caused injurious affection to her lands remaining after the expropriation.

36. Elizabeth has therefore been injuriously affected by the Respondent's expropriation and claims compensation for same pursuant to the *Expropriations Act*.

Distrubance Damages and Damages for Delay

37. The Respondent froze the development of Elizabeth's expropriated and remaining lands for at least 9 years while it attempted to acquire its requirements for the Spring Garden Complex. Elizabeth has suffered damages for delay as a result, in that she has been unable to acquire the necessary planning approvals or install services and sell her lots. She has been put to the expense of paying municipal taxes while she has been unable to make productive use of her land. She has also been unable to sell her lands for their fair market value and use the proceeds for her retirement. Development continues to be frozen as a result of the existence and placement of the Spring Garden Complex.

38. Alternatively Elizabeth claims interest from 1997 pursuant to the *Expropriations Act*, or from the date the development potential of Elizabeth's land was sterilized, as determined by the Board.

39. Elizabeth has also incurred out of pocket expenses as a natural and reasonable consequence of the expropriation. These expenses include, among other things, interest charges on out of pocket costs. Further particulars of these damages will be provided prior to, or at, the hearing of this matter.

40. Elizabeth claims compensation for disturbance damages pursuant to section 18 or section 32 of the *Expropriations Act*.

Section 25 Offer and Penalty Interest

41. The Respondent did not serve an offer and supporting appraisal report within 90 days of the expropriation as required by section 25 of the *Expropriations Act*.

42. It was not until July 26, 2006 that the Respondent provided its first offer of compensation to Elizabeth. This was more than two years after the date required by the *Expropriations Act*. Elizabeth claims penalty interest on outstanding compensation at a rate of 12%, pursuant to subsections 25(4) and 33(2) of the *Expropriations Act*.

Summary of Claim

43. Elizabeth claims the following as compensation pursuant to sections 13, 18, 25(4), 32 and 33 of the *Expropriations Act*:

a) **$325,000 for the market value** of the fee simple interest expropriated by the Respondent, pursuant to paragraph 13(2)(a) of the *Expropriations Act*;

b) **$85,500 for injurious affection** to Elizabeth's remaining lands as a result of the Respondent's expropriation, pursuant to paragraph 13(2)(c) of the *Expropriations Act*;

c) **$25,000 as damages for delay and disturbance damages** as a result of the Respondent's expropriation, pursuant to sections 18 and 32 of the *Expropriations Act*;

d) **Penalty interest at the rate of 12% on outstanding compensation** as a result of the Respondent's failure to serve a section 25 offer on Elizabeth, pursuant to subsections 25(4) and 33(2) of the *Expropriations Act*;

e) Legal, appraisal and other reasonable professional costs incurred by Elizabeth in the determination of her claim for compensation, pursuant to section 32(1) of the *Expropriations Act*;

f) Interest in accordance with section 33 of the *Expropriations Act*;

g) Such further and other relief as counsel may advise and the Board may deem appropriate.

44. Elizabeth pleads and relies upon the provisions of the *Expropriations Act*.

45. This Notice is given by **RAYMAN BEITCHMAN LLP**, and the address at which documents may be served is:

June 24, 2016

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